Ng Peter @ Ng Chee Keong v Kurnia Insurans (M) Bhd (Robert Michael Fernandez (formerly t/a Hydrotec Marine Services, third party))

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7–22–1297 OF 2003
HARMINDAR SINGH JC
6 JANUARY 2010

Civil Law Act — Insurance — Marine insurance — Whether English marine insurance law applicable in Malaysia — Whether provisions of the Marine Insurance Act 1906 (UK) applicable in Malaysia — Civil Law Act 1956 s 5(1)

Insurance — Marine insurance — 'Voyage' and 'time' policies distinguished — Time policy — Seaworthiness of vessel, how ascertained — Defence of unseaworthiness, elements of — Burden of proving unseaworthiness, whether on insurers — Marine Insurance Act 1906 (UK) ss 25(1) & 39(5)

Shipping and Navigation — Marine insurance — Seaworthiness of vessel, how ascertained — Defence of unseaworthiness, elements of — Whether burden of proving unseaworthiness on insurers — Marine Insurance Act 1906 (UK) ss 25(1) & 39(5)

Words and Phrases — 'Privity' — Marine Insurance Act 1906 (UK) s 39(5)

The plaintiff owned a yacht that was insured with the defendant. On 11 September 2002, the yacht sank whilst sailing towards Pulau Tioman. The defendant appointed the third party to salvage the yacht. The yacht was initially found to be intact and in substantially good condition on a diving inspection, but was later recovered and written-off as a constructive loss. The plaintiff claimed compensation from the defendant but the defendant refused to pay on the basis that the yacht was unseaworthy. The defendant maintained that the yacht was unseaworthy because: (i) it was suffering from constant leaks at the propeller shaft seals; (ii) its crew was unfit and/or insufficient; and (iii) it suffered serious water leakages due to the plaintiff's purchase of 11 bilge pumps over a period of four years. The defendant also alleged that the third party was negligent in carrying out the salvage works. The plaintiff sued the defendant to recover compensation under the policy and the defendant sued the third party to recover damages and contribution for the loss of the yacht.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's claim against the third party with costs:

(1) In the instant case, the marine insurance law applicable was the UK Marine Insurance Act 1906 ('the Act') by virtue of s 5(1) of the Civil Law Act 1956. The policy issued by the defendant was a time policy as defined by s 25(1) of the Act, and the defendant was relying on the defence of 'unseaworthiness' as set out in s 39(5) of the Act. There are three elements to this defence. First, there must have been unseaworthiness at the time the vessel was sent to sea. Second, the unseaworthiness must have been causative of the relevant loss. Third, the assured must have been privy to sending the ship to sea in that condition (see paras 6–8); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and La Reunion Europeene (The Star Sea)* [2001] Lloyd's Rep 389 followed.

(2) The question of seaworthiness is not limited to the condition of the vessel. Apart from fitness of the vessel, it also includes having a competent and sufficient crew and operational conditions of various equipment and machinery on board at the time of departure to attend to any given emergency at sea. The burden of proving unseaworthiness rests on the insurers (see paras 15–16).

(3) The yacht was not unseaworthy because of the propeller shaft leak. Further, the plaintiff's buying of 11 bilge pumps over a period of four years did not indicate a major problem. On the contrary, it suggested that the plaintiff was conscious about the safety of the boat. The yacht was not unseaworthy on this count. The manning of the yacht could not also lead to the conclusion that the yacht was unseaworthy. The only reasonable conclusion on the evidence in this case was that the yacht was seaworthy when it commenced its voyage. On this score alone, the plaintiff's claim against the defendant was payable (see paras 46 & 52).

(4) The word 'privity' in s 39(5) of the Act means 'with knowledge and consent'. In the instant case, the plaintiff was not in any way privy to any unseaworthiness of the yacht (see paras 56 & 60); *Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The 'Eurysthenes')* [1976] 2 Lloyd's Rep 171 referred.

(5) Unseaworthiness did not cause the loss in the instant case. The proximate cause of loss in the instant case was a peril of the seas which the yacht encountered when it hit a submerged object enroute to Pulau Tioman (see para 67).

A (6) On the facts and circumstances, the defendant had failed to prove negligence on the part of the third party. Its claim against the third party thus failed (see para 77).

[Bahasa Malaysia summary

B Plaintif memiliki sebuah perahu layar yang diinsuranskan dengan defendan. Pada 11 September 2002, perahu layar itu telah tenggelam semasa belayar menuju ke Pulau Tioman. Defendan telah melantik pihak ketiga untuk menyelamatkan perahu layar itu. Perahu layar itu pada mulanya dijumpai tidak rosak dan dalam keadaan yang agak baik semasa pemeriksaan
C penyelaman, tetapi kemudian dijumpai semula dan dilupuskan sebagai kehilangan konstruktif. Plaintif menuntut ganti rugi daripada defendan tetapi defendan enggan membayar atas dasar bahawa perahu layar itu tak layak layar. Defendan menegaskan bahawa perahu layar itu adalah tak layak layar kerana: (i) ia sering mengalami kebocoran pada sendal aci kipas; (ii)
D anak kapalnya tidak layak dan/atau tidak mencukupi; dan (iii) ia mengalami kebocoran air yang serius akibat daripada 11 pam bilga yang dibeli plaintif sepanjang empat tahun tersebut. Defendan juga mengatakan bahawa pihak ketiga cuai melaksanakan kerja-kerja penyelamatan. Plaintif telah menyaman defendan untuk mendapat pampasan di bawah polisi dan defendan
E menyaman pihak ketiga untuk mendapat ganti rugi dan kerana telah menyumbang kepada kehilangan perahu layar tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan defendan terhadap pihak ketiga dengan kos:

F (1) Dalam kes ini, undang-undang insurans marin yang terpakai adalah Akta Insurans Marin 1906 UK ('Akta') menurut s 5(1) Akta Undang-Undang Sivil 1956. Polisi yang dikeluarkan oleh defendan adalah polisi masa sepertimana yang ditakrifkan dalam s 25(1) Akta, dan defendan telah bergantung kepada pembelaan 'unseaworthiness'
G sepertimana dinyatakan dalam s 39(5) Akta. Terdapat tiga elemen terhadap pembelaan ini. Pertama, ketaklayaklayaran perlu wujud pada masa kapal itu belayar ke laut. Kedua, ketaklayaklayaran mungkin penyebab kehilangan yang berkaitan. Ketiga, orang yang diinsuranskan mungkin privi yang menghantar kapal tersebut ke laut dalam keadaan
H tersebut (lihat perenggan 6–8); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and La Reunion Europeene (The 'Star Sea')* [2001] Lloyds Rep 389 diikut.

(2) Persoalan tentang ketaklayaklayaran tidak terhad kepada keadaan kapal tersebut. Selain daripada ketegapan kapal tersebut, ia juga termasuklah
I mempunyai anak kapal yang kompeten dan mencukupi dan terdapat peralatan dan mekanisme berada dalam keadaan yang boleh beroperasi di atas kapal pada masa ia berlepas untuk menangani apa-apa kecemasan di laut. Beban bukti ketaklayaklayaran terletak pada syarikat insurans (lihat perenggan 15–16).

(3) Perahu layar tersebut bukan tak layak layar kerana lubang kipas yang bocor. Tambahan pula, 11 pam bilga yang dibeli oleh plaintif sepanjang empat tahun itu tidak menunjukkan apa-apa masalah besar. Sebaliknya, ia mencadangkan bahawa plaintif sedar tentang keselamatan bot tersebut. Perahu layar itu tidak bersifat ketaklayaklayaran. Pengendalian perahu layar tersebut juga tidak mungkin membawa kepada kesimpulan bahawa perahu layar tersebut tak layak layar. Satu-satunya kesimpulan yang munasabah atas keterangan kes ini adalah bahawa perahu layar itu layak belayar semasa ia bermula pelayarannya. Berdasarkan ini sahaja, tuntutan plaintif terhadap defendan mesti dibayar (lihat perenggan 46 & 52).

(4) Perkataan 'privity' dalam s 39(5) Akta bermaksud 'with knowledge and consent'. Dalam kes ini, plaintif bukan privi dalam apa keadaan dengan apa-apa ketaklayaklayaran perahu layar tersebut (lihat perenggan 56 & 60); *Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The 'Eurysthenes')* [1976] 2 Lloyd's Rep 171 dirujuk.

(5) Ketaklayaklayaran tidak menyebabkan kehilangan dalam kes ini. Sebab langsung kehilangan dalam kes ini adalah bahaya di laut yang telah dialami oleh perahu layar tersebut apabila ia terlanggar objek di bawah air dalam pelayaran ke Pulau Tioman (lihat perenggan 67).

(6) Berdasarkan fakta dan keadaan, defendan telah gagal untuk membuktikan kecuaian di pihak ketiga. Tuntutannya terhadap pihak ketiga dengan itu gagal (lihat perenggan 77).]

Notes

For a case on marine insurance, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 3745.

For a case on 'voyage' and 'time' policies distinguished, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 238.

For cases on marine insurance generally, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1544–1585.

Cases referred to

Ajum Goolam Hossen & Co v Union Marine Insurance Company, Limited; Hajee Cassim Joosub and another v Ajum Goolam Hossen & Co [1901] AC 362, PC (refd)

Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The 'Eurysthenes') [1976] 2 Lloyd's Rep 171, CA (refd)

Malayan Motor & General Underwriter (Pte) Ltd v MH Almojil [1982] 2 MLJ 2, CA (refd)

A *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and La Reunion Europeene (The Star Sea)* [2001] 1 Lloyd's Rep 389, HL (folld)
P Samuel and Company, Limited v Dumas and another appeal [1923] 1 KB 592, CA (refd)
Pickup v The Thames and Mersey Marine Insurance Company, Limited (1878)
B 3 QBD 594, CA (refd)

Legislation referred to

Civil Law Act 1956 s 5(1)
Marine Insurance Act 1906 [UK] ss 25(1), 39, 39(4), (5), 55(1), First
C Schedule r 7

Nathan Maharajah (Ian Lawrence Pereira with him) (Lawrence Pereira & Partners) for the plaintiff.
Shanti Supramaniam (See Jooi Hong with her) (Belden) for the defendant.
K Goik (Nasir, Kenzin & Tan) for the third party.

D

Harmindar Singh JC:

[1] The plaintiff was the owner of the boat called 'Erlin'. Some would call
E it a yacht. This yacht was a 44 footer built in Hong Kong in 1981 and rebuilt in 1999. It was fitted with two Cummins Diesel 320 HP engines. The plaintiff used it as a pleasure craft. The yacht was insured with the defendant in the sum of RM400,000 for the period between 22 January 2002 until 21 January 2003.

F

[2] On 11 September 2002, the yacht was on its way to Pulau Tioman, Johor when it sank. The defendant was notified. They appointed Links Survey (M) Sdn Bhd ('Links Survey') to investigate as to the cause and damage to the yacht. Links Survey, on behalf of the defendant, appointed
G Petroman Corporation Sdn Bhd ('Petroman') to conduct a diving inspection of the sunken yacht at the reported site. The diving inspection, which was carried out on 21 September 2002, revealed that the yacht was largely intact and in a substantially good condition. The third party was then appointed by the defendant on 30 September 2002 to salvage the yacht at a cost of
H RM85,000. The yacht was refloated on 2 October 2002 and brought to shore on 6 November 2002. The yacht eventually ended up as a wreck.

[3] The plaintiff made a claim for compensation from the defendant. Vide letter dated 13 March 2003, the defendant agreed to settle the plaintiff's
I claim. Later on, the defendant refused to pay as they claimed that the yacht was sent out to sea in an unseaworthy condition. The third party was paid the sum of RM85,000 for the salvage works. The defendant is now claiming that the third party was negligent in carrying out their duties. They are claiming for damages as well as seeking contribution for the loss of the boat.

[4] The issues for determination, as I see it, are in relation to the claim of the plaintiff against the defendant: **A**

(a) Whether the yacht was sent out to sea in an unseaworthy condition.

(b) If it was unseaworthy, whether the yacht was sent out to sea with the privity of the plaintiff. **B**

(c) If plaintiff had privity, whether the unseaworthiness was causative of the loss.

[5] In relation to the claim by the defendant against the third party, the issue is whether the third party was negligent in carrying out the salvage works. **C**

THE APPLICABLE LAW

D

[6] This being a marine insurance claim, reference has to be made to marine insurance law. The applicable law is the UK Marine Insurance Act 1906 by virtue of s 5(1) of the Civil Law Act 1956. The provision that is relevant to the instant case is s 39 of the UK Marine Insurance Act 1906 ('MIA 1906') which reads as follows: **E**

39

(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. **F**

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage. **G**

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure. **H**

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. **I**

[7] In the present case, it was common ground that the policy issued by the defendant was not a voyage policy but a time policy. The difference between the two types of policies is set out in s 25(1) of the MIA 1906 which reads:

A 25(1) where the contract is to insure the subject matter at and from or from the place to another or others, the policy is called a 'voyage policy' and where the contract is to ensure the subject matter for a definite period of time the policy is called a 'time policy'. A contract for both voyage and time may be included in the same policy.

B

[8] This being a time policy, the defendant is essentially relying on the defence as set out in s 39(5) of the MIA 1906. It was stated by the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd and La Reunion Europeene (The Star Sea)* [2001] 1 Lloyd's Rep 389 that there are
C three elements in this defence. First, there must have been unseaworthiness at the time the vessel was sent to sea. Second, the unseaworthiness must have been causative of the relevant loss. Thirdly, the assured must have been privy to sending the ship to sea in that condition (per Lord Hobhouse at p 393).

D WAS THE YACHT UNSEAWORTHY?

[9] It was conceded by the defendant, and indeed the law says so, that if the yacht was seaworthy when it was sent out to sea, then the claim is payable.

E **[10]** Now, what is seaworthiness? To recap, s 39(4) of the MIA 1906 provides: 'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'

F **[11]** In *Malayan Motor & General Underwriter (Pte) Ltd v MH Almojil* [1982] 2 MLJ 2, the Singapore Court of Appeal had occasion to deal with the issue of seaworthiness. Lai Kew Chai J, in delivering the judgment of the court observed (at p 5):

G What amounts to seaworthiness? It is not a fixed but a relative standard varying according to the ship and the exigencies of each voyage. The ship should be in a condition to encounter whatsoever perils of the sea a ship of that kind laden in that way, may be fairly expected to encounter: *Steel v State Line SS Co* (1877) 3 App Cas 72 at p 77 per Lord Cairns.

H **[12]** It is worth noting that the court also held that unseaworthiness will only be a defence available to underwriters if the ship was insured under a voyage policy and not a time policy.

[13] *Halsbury's Laws of England* (4th Ed), Vol 25 at para 66 states as follows:

I *Meaning of 'seaworthiness'*. The vessel must be reasonably fit. 'Seaworthiness' is a relative term, and may vary with the class of the ship insured. Thus, a river steamer insured for a sea voyage need not be made as fit for the voyage as an ocean-going vessel. She need only be made as seaworthy as is reasonably practicable by ordinary available means.

Moreover, the standard of seaworthiness varies with the nature of the voyage insured; the vessel may be seaworthy for one voyage but not for another, or for a voyage at one season of the year and not for a voyage at another season; she may be seaworthy when laden with one kind of cargo and not so when laden with another kind.

[14] And further at para 67 as follows:

Respects in which vessel must be seaworthy. The ship must be reasonably fit in all respects. She must be competent in hull to encounter the ordinary perils of the seas and properly equipped with the necessary tackle, stores, supplies, provisions, medicines, and other things requisite for the safety of the voyage and those on board her, and she must have her engines and boilers in sound and proper condition, and also an adequate supply of fuel for the voyage.

A temporary defect, however, in the ship's condition, due to some negligence at the time of sailing, does not constitute a breach of the implied warranty of seaworthiness, provided that the state of the ship is such that, if the master and crew do their duty, the defect can be remedied or any danger from it averted. Thus, a ship is not unseaworthy on account of a port-hole being improperly left open at the commencement of the voyage if it can be readily closed at sea whenever necessary.

The vessel must also at the commencement of the voyage be properly manned with a competent master and a competent and adequate crew, and must have a pilot on board at the port of departure in case where there is an establishment of pilots at that port and the nature of the navigation requires one.

[15] The question of seaworthiness therefore is not limited to the condition of the vessel. Apart from fitness of the vessel, it also includes having a competent and sufficient crew and operational conditions of various equipment and machinery on board at the time of departure to attend to any given emergencies at sea.

[16] The burden of proving unseaworthiness rests on the insurers (see Robert Markin, (2000), *Marine Insurance Legislation* at p 38 citing the cases of *Pickup v The Thames and Mersey Marine Insurance Company, Limited* (1878) 3 QBD 594 and *Ajum Goolam Hossen & Co v Union Marine Insurance Company, Limited; Hajee Cassim Joosub and another v Ajum Goolam Hossen & Co* [1901] AC 362).

[17] In the instant case, SP1 gave evidence that he was employed by the plaintiff as skipper of the yacht some time in June 2002. At the time the yacht was berthed in Port Klang. Between the months of June and August 2002, the yacht was used by the plaintiff and his family for outings around the islands in Melaka. On 24 August 2002, SP1 received instructions to navigate the yacht to Desaru. The yacht arrived in Desaru on 26 August 2002. SP1

said that there were no problems during the journey. The yacht was then moored in Desaru close to the Desaru Perdana Beach Resort until 10 September 2002. On that day, he proceeded towards Pulau Tioman upon the instructions of the plaintiff. He started at about 11am and travelled at a speed between 9–12 knots as he claimed that that was the most economical speed. Now there is some dispute as to where the yacht was moored and the speed it was travelling and I will deal with that at a later juncture.

[18] Some three hours later at about 2pm, SP1 felt a sharp vibration and assumed that the yacht had hit a submerged object. He stopped the port engine and inspected the engine compartment and saw that the port shaft seal was leaking and water had ingressed till about two feet above the keel. He then started the two bilge pumps which served the engine compartment to drain out the water. One of the pumps was not working due to a short circuit. He noticed that the discharging rate was far below the rate of water ingress.

[19] SP1 then decided to proceed towards land. He then tied up the yacht to some floats located near the coast and let go the anchor to avoid drift. He then noted the position of the yacht using the GPS.

[20] By then the yacht had already developed a heavy port list. SP1 lowered the small rescue boat with an outboard engine and cleared off from the yacht. He was then taken away by his friends on a fishing vessel. As he left, he saw the yacht submerged and nearly sinking. The next day, he lodged a police report at the Kuala Sedili Police Station, Kota Tinggi, Johor.

[21] The defendant contend that the yacht was unseaworthy at the time it was sent out to sea for the following reasons:

(a) the yacht was suffering from constant leaks at the propeller shaft seals;

(b) the crew of yacht was unfit/insufficient; and

(c) the yacht suffered critical equipment problems — bilge pumps.

[22] Now each side called experts to advise the court on each of these matters. For the plaintiff, there was first Mr AH Tan ('SP2') who was a qualified marine surveyor with 27 years experience in investigation of hull losses on behalf of local and overseas insurers. He also held a First Mate Certificate of Competency from the Marine Department, Hong Kong.

[23] SP2 was appointed by the defendant to investigate and adjust the loss of the yacht. After his investigation which included an interview with SP1 and inspection of the yacht after it was salvaged, he prepared a report. In his report, he concluded that the plaintiff's claim was payable.

[24] Next for the plaintiff was Mr Martin Grimley ('SP3') who was the managing director of an engineering company that specialised in repairing and maintaining pleasure crafts. He was based at the Royal Selangor Yacht Club, Port Klang. He had extensive experience in all aspects of the design, service, rebuilding and maintenance of pleasure crafts and yachts including repair and overhaul of marine engines. As his CV shows, he is a Royal Yachting Association ('RYA') Yacht Master and Power Boat Instructor and once even sailed around the world on his own in a 50 feet steel schooner.

[25] For the defendant, there was Capt Mohana Das Nehru ('SD2') who was a marine surveyor and consultant for underwriters, shipowners, banks, ship repairers and shippers. He had a Master Class I, Foreign Going Certificate of Competency from the Australian Maritime Safety Authority. His company was engaged by the defendant to investigate the plaintiff's claim on his hull marine policy and to provide an opinion on the cause for the sinking of the yacht. He interviewed SP1 and even obtained a statutory declaration from him. In his report and in his testimony, he concluded that the claim was not payable as the yacht was unseaworthy when it left Desaru. He also opined that the third party salvors did not refloat or salvage the yacht in a safe or secure manner thus causing heavy damage during the salvage process.

Propeller shaft leak

[26] SP1 did say that there was a constant leak on both propeller shaft seals throughout his tenure on board from June 2002 till the day the yacht sank. However, he said that it was at an acceptable rate.

[27] Now to anyone unacquainted with such boats, a leak may conjure up images of possible disaster with water flowing into the boat — the last thing anyone at sea on a boat wishes to see. However, that is not quite the case here. The seal is actually designed to allow water from the sea to travel up the shaft to lubricate the shaft while the boat is under way. If too much water comes in, the packing seal is tightened or adjusted to control the seepage of water into the boat. If the seal is tightened such that there is no leak, then the shafts would overheat and get damaged. So what this means is that all propeller shaft seals leak to a certain degree.

[28] Now this much was agreed by all the experts. They all agreed that there must be a leak to the extent that it is only drips but not flows of water. Now how many drips was acceptable was disputed. SP3 says that even up to 150 drips per minute was acceptable as long as it was still dripping. SD2 however opined that it should not be more than two to three drips per minute and he produced as his reference various materials from the internet.

A **[29]** After due consideration, I took the view that SP3 was certainly more knowledgeable than SD2 when it came to packing seals. SD2 could not be said to be an expert on this issue as his opinion was based not on his own experience like SP3 but on articles from the internet which were not authenticated and which, as SP3 explained, were articles for owners of B sailboats which have totally different engine configurations from power boats.

[30] In any event, SP1 had testified that the drip rate was within one to ten drips per minute from the propeller shaft seals while the vessel was travelling. He also said that the seals were hardly leaking when the vessel was stationary. C This being the case, I do not see how the yacht could be deemed to be unseaworthy with regards to the shaft seal leak.

[31] I suspect that this issue was raised because there was some confusion as to the speed the yacht was travelling before it sank. SP1's statutory D declaration indicates that the yacht was travelling at the sped of 2 knots. The defendant appear to think that the yacht must have been travelling at such a slow speed due to serious leakage problems. In essence, the defendants are saying that the sinking of the vessel was caused by barratry or scuttling of the vessel by SP1. E

[32] Now SP1 in his testimony said that the declaration was incorrect and that the speed should read as 12 knots. He said that he travelled that fateful day at a speed between 9–12 knots. He claimed that he could not have F reached the point where the yacht sank if he had travelled at 2 knots.

[33] SD2 told the court that he distinctly remembered the speed of 2 knots and that it was also stated as 2 knots in the Links Survey report. The Links Survey report was prepared by SP2. In this report, the speed was first stated G as 2 knots in the earlier part of the report and at the end of the report it was stated as 12 knots. Clearly, there is an error here. SP2 in his testimony clarified that the speed should read as 12 knots and not 2 knots. To prove this, he tendered into court his initial hand written draft and the first typed draft of his report and showed that his secretary had failed to correct his H amendment to 12 knots in his final report.

[34] Now much was also made about where the yacht was anchored prior to its fateful voyage. SP1 was clear about this in that he said it was moored off the beach of the Desaru Perdana Beach Resort. If that was indeed the case, I then the yacht cannot have been travelling at 2 knots to reach the point where it began to sink.

[35] It is noteworthy that SD2 did not ask SP1 where the voyage began or the course that the vessel took. If he had done so, it would have occurred to

him that the yacht could not have been travelling at 2 knots. His subsequent postulation that the yacht was anchored at Tanjung Kelisa and not where SP1 claimed was pure speculation. When asked about the strong head current or tail current that prevailed in the waters where the yacht travelled, SD2 said that he was referring to the net speed travelled after considering the current calculated by the GPS. But there is no evidence that this was also how SP1 calculated the speed. In all probability, SP1 could have been referring to the speed as reflected in the speedometer in the yacht and not the GPS.

[36] After due consideration, I considered that it was more than likely that the speed of the yacht 'Erlin' was between 9–12 knots as the skipper had testified. This is more consistent with the rest of the evidence when compared to SD2's testimony which was base more on theories and speculation rather than the established evidence.

[37] This view is fortified when SP1 says in his police report, his statutory declaration and in his testimony in court that the yacht must have hit a submerged object which caused water to come into the engine compartment and which in the end led to the sinking of the yacht.

[38] When the yacht was eventually brought to shore by the third party, it was found that the propeller shafts were damaged. SP2 inspected the yacht and found that the port side propeller and shaft were bent indicating that the boat had hit a submerged object. He opined that if the shaft was damaged, the seal would leak and water will enter the vessel at a fast rate. When asked if the propeller and shaft damage could have been caused by the sinking of the yacht to the bottom and not the collision, SP2 replied that all the blades were bent and the shaft was heavily bent upwards as well. In his view, if the propeller and shafts hit the sand, most probably one blade will be bent but not all the blades. If it hit something in the water in a rotating manner, all the blades will be bent badly. SP2 concluded that the damage was consistent with hitting an object and not rolling on the bottom.

[39] It is unfortunate that SD2 did not deal with this issue. Instead, he alluded to the minimal damage that would have been caused if the yacht was travelling at 2 knots. His evidence, I think, should be discounted as it is contrary to the direct evidence of the damaged propeller and shaft as testified by SP2 and corroborated by photographs of the same.

[40] In this regard, I had also considered the pertinent evidence relating to the maintenance of the yacht. The plaintiff had tendered evidence of all the expenses incurred on account of the vessel. It certainly appears that the plaintiff had spent considerable time, money and effort in maintaining the vessel. It should follow therefore that the vessel would have been in excellent

A condition. So this is another factor which goes against any suspicion that the plaintiff may have been thinking of scuttling his yacht.

[41] It should also be noted that prior to the yacht arriving at Desaru, it had travelled all the way from Melaka without problems. If the yacht was B having severe leaking problems as the defendants suggest, I do not think the yacht would have made it that far.

[42] For all the aforesaid reasons, I do not think the yacht was unseaworthy because of the propeller shaft leak.

C

The bilge pumps

[43] The defendant argue that since bilge pumps are essential equipment in a vessel, they must be operational at all times. If they are not operational, the D yacht may be left in a dangerous position of not being able to cope with emergency situations such as flooding. The defendant further contend that since the plaintiff was buying three bilge pumps every month and a total of 11 had been purchased from June 1998 until 2002, the yacht must here been E suffering from serious and sudden water leakages.

[44] Now what are bilge pumps? What do they do? SP3 told the court that it is a pump which is fixed to the bilge of the boat to remove any form of water which may come into the boat. As water quite often collects at the bilge F most vessels have an automatic pump which switches on when the water reaches a certain level. Bilge pumps are also designed to work in flooded conditions as they are submersible in nature.

[45] In this regard, there is evidence by the plaintiff that new bilge pumps G had to be installed when the yacht was completely rebuilt in 1998–1999. These pumps were also not expensive as according to the plaintiff, they cost about RM115 each. This is also shown in the receipt at p 405 of the bundle of documents marked 'B1'. According to the evidence, these pumps are not durable or reliable and therefore spares have to be kept. There was also H evidence that each section of the yacht is fitted with separate bilge pumps. It was common for these pumps to be blocked by debris.

[46] I therefore think that far from any serious problem, the plaintiff was really being diligent by fitting pumps at each section of the boat and keeping I spares on the vessel to replace them quickly when the need arose. I do not think buying 11 bilge pumps over a period of four years indicates a major problem. On the contrary, it suggests that the plaintiff was conscious about the safety of the boat. It would be suspicious if no bilge pumps were bought given the evidence of their rather fragile nature. I do not therefore think the

yacht was unseaworthy on this count.

Unfit/insufficient crew

[47] SD2 testified that in his view the yacht was unseaworthy as there was only SP1 manning the yacht for the voyage from Desaru to Tioman Island. He opined that an additional crew member was necessary to cope with emergencies. The defendant also took issue with the qualifications and experience of SP1.

[48] The insurance policy states under warranty 7 the following:

> Warranted vessel will be manned and controlled by the insured or in his absence any experience/qualified crew.

[49] Now the first question that has to be asked is whether SP1 was experienced or qualified. The evidence disclosed that SP1 had obtained a certificate of competency as a Limited Helmsman from the Malacca Marine Department in 1994. He had worked on boats for 15 years and had seven years of experience on similar vessels. He had experience as well in repairing the boat and its engines.

[50] When asked how he would define qualified crew on a pleasure craft, SP3 answered that it would include anyone who had a good knowledge of the vessel and had experience on board as a skipper as well as competency in berthing the vessel and tackling challenging sea conditions. He should also be capable of performing basic maintenance of the electricals and mechanicals of the vessel. He was of the view that SP1 was well qualified to man the yacht in this case. His view was shared by SP2. SD2 only raised the question of SP1 failing to renew his certificate but that really sounds like a meek argument. I do not think that SP1 suddenly became incompetent when he failed to renew his certificate as that is only a technicality which was even admitted by SD2. In much the same way, I do not think any right thinking person would consider Michael Schumacher, to take an extreme example, incompetent to drive a car if for some reason he fails to renew his driving licence. I was therefore quite satisfied that SP1 had the necessary qualifications and experience to pilot the yacht.

[51] The second question is whether it was proper for the yacht to be manned by only one person, SP1. SD2 thought it was dangerous for a single man voyage from Desaru to Tioman on the yacht. Now all parties agreed that there are no regulations or statutory requirements in relation to the qualifications and number of crew required under the Malaysian law. I also noted, as opined by SP3, that if a single man or woman is capable of sailing

around the world as has been done many times, a short voyage from Desaru to Tioman could hardly be considered unacceptable, taking into account the experience of the skipper.

[52] So, for all the reasons aforesaid, I do not think the manning of the yacht could lead to the conclusion that the yacht was unseaworthy. It would therefore appear that the only reasonable conclusion on the evidence in this case was that the yacht 'Erlin' was seaworthy when it commenced its voyage from Desaru to Pulau Tioman. On this score alone, the plaintiff's claim against the defendant is payable.

PRIVITY OF THE INSURED

[53] For the sake of completeness, I will also deal with the issue of privity.

[54] In *Compania Maritima San Basilio SA v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The 'Eurysthenes')* [1976] 2 Lloyd's Rep 171, the English Court of Appeal considered the meaning of the word 'privity' in s 39(5) of the MIA 1906. In this regard, Lord Denning MR observed as follows (at p 179):

> Such is, I think, the meaning we should attach to the word 'privity' in s 39(5). If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred.
>
> To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry — so that he should not know it for certain — then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.
>
> The knowledge must also be the knowledge of the shipowner personally, or his alter ego, or, in the case of a company, its head men or whoever may be considered their alter ego. It may be inferred from evidence that a reasonably prudent owner in his place would have known the facts and have realised that the ship was not reasonably fit to be sent to sea. But, if the shipowner satisfies the court that he did not know the facts or did not realise that they rendered the ship unseaworthy, then he ought not to be held privy to it, even though he was negligent in not knowing.
>
> Let me test it by taking the imaginary instances which Lord Justice Geoffrey Lane pun in the course of the discussion. If the owner of the ship says to himself: 'I think a reasonably prudent owner would send her to sea with a crew of 12. So I will send

her with 12', he is not privy to unseaworthiness, even though a judge may afterwards say that she ought to have had 14. He may have been negligent in thinking so, but he would not be privy to unseaworthiness. But, if he says to himself: 'I think that a reasonably prudent owner would send her to sea with a crew of 12, but I have only 10 available, so I will send her with 10', then he is privy to the unseaworthiness, if a judge afterwards says he ought to have had 12. The reason being that he knew that she ought to have had 12 and consciously sent her to sea with 10.

[55] Roskill LJ also dealt with this issue as follows (at p 184):

In the context of the Act as a whole I think it is clear that 'privity' in this sub-section is not the same as 'willful misconduct'. Nor is it the same as negligence or fault, whether personal or otherwise. The subsection says that the underwriter is excused if the ship is sent to sea in an unseaworthy state with privity of the assured. The must mean that he is privy to the unseaworthiness and not merely that he has knowledge of facts which may ultimately be proved to amount to unseaworthiness. In other words, if the ship is sent to sea in an unseaworthy state with his knowledge and concurrence and that unseaworthiness is causative of the loss, the time policy does not pay. There must be causative unseaworthiness of which he knew and in which he concurred. Mr Mustill at one point of his argument used the phrase 'conscious realisation of the implication of the facts making the ship unseaworthy'. I would accept that phrase as correctly conveying the underlying intention of this subsection, though I have rejected his wider argument that privity must be equated with willful misconduct.

[56] On the same issue, Geoffrey Lane LJ observed as follows (at p 188):

For the owners to lose their cover it must be shown that the ship was sent to sea in an unseaworthy condition and that that was done with the privity of the assured. 'Privity' means 'with knowledge and consent'. It has, so far as I can discover, no connotation of fault. It is a neutral word, deriving colour from its surroundings. One can be privy to a good scheme or privy to an evil scheme. The nearest the word gets to a bad connotation is that there are overtones of secrecy in it. But the desirability of secrecy can arise in the case of a good action as well as a bad. Accordingly I am unable to find any philological basis for Mr Lloyd's contention that the use of the word 'privity' means that negligence as opposed to actual knowledge of some sort on the part of the assured is enough.

[57] So the question comes down to this. Was the yacht sent out to sea in an unseaworthy condition, with the knowledge and consent of the plaintiff? Now we are of course assuming that the yacht was unseaworthy as I had already ruled that it was seaworthy.

[58] The defendant made much of the fact that 11 bilge pumps were purchased and therefore the plaintiff must have known the yacht had severe

water leakage problems. It was also submitted that SP1's statutory declaration also suggests that the plaintiff must have known about this problem.

[59] I have already dealt with the bilge pumps issue and I need say no more. As to SP1's testimony, he said that he did not inform the plaintiff about the condition of the yacht. Now this of course makes sense as he had said in his statutory declaration, the leak on both the propeller shaft seals was at an acceptable level. So there was no need to inform the plaintiff and it would logically follow that there was no need for the plaintiff to ask SP1 to repair the leak.

[60] I am therefore unable to see how the plaintiff was in any way privy to any alleged unseaworthiness.

UNSEAWORTHINESS AS CAUSATIVE LOSS

[61] Assuming the yacht was unseaworthy, could it be said that it was that unseaworthiness that was the causative loss?

[62] Now this question cannot be separated from the question of whether the yacht had collided with a submerged object in the sea which caused it to leak water and sink.

[63] I have already considered and given reasons as why I accepted that the yacht sank after it collided with a submerged object. The only question that remained is whether the yacht encountered a peril of the sea causing it to sink.

[64] Perils of the sea is defined in r 7 of the Construction Rules in the First Schedule to the MIA 1906 and reads:

> The term 'perils of the sea' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the wind and waves.

[65] In *P Samuel and Company, Limited v Dumas and another appeal* [1923] 1 KB 592, Scrutton LJ in the Court of Appeal said: 'But it is clear that there must be a peril, an unforeseen and evitable accident, not a contemplated and inevitable result; and it must be of the seas, not merely on the seas. The ordinary action of the winds and waves is 'of the seas' but not a peril.'

[66] The underwriter is also not liable for any loss which is not proximately caused by a peril insured against. This is provided in s 55(1) of the MIA 1906 which reads:

Subject to the provisions of this Act and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

[67] I think there can be no doubt that the proximate cause of loss in this case was a peril of the seas which the yacht encountered when it hit a submerged object enroute to Pulau Tioman.

[68] In the result, the plaintiff's claim is payable and must therefore succeed.

NEGLIGENCE OF THE THIRD PARTY

[69] The defendant claims that the third party had negligently performed the salvage operation of the yacht or without due care and as a result, they had suffered losses.

[70] The particulars of negligence were pleaded in the following fashion:

(a) Failed to perform the salvage operation with due care.

(b) Failed to prevent and/or minimise damage to the salved yacht during the salvage operation.

(c) Failed to prevent the yacht from rolling continuously and hitting the concrete blocks.

(d) The yacht had been dragged causing great damage to the physical structure of the yacht.

[71] Now the terms and conditions of the contract between the defendant and the third party were contained in the third party's letter dated 28 September 2002 which included the following:

(a) locate the yacht and air lift it to the surface;

(b) tow the yacht from salvage location to a beach anywhere near Desaru; and

(c) ground the yacht at a suitable location and proceed to drain/pump the water out of the vessel and patch the leaks and to refloat the vessel with the option to either tow back to Port Klang by sea or by overland transporter.

[72] It was contended on behalf of the defendant that the third party took more than a month to salvage the yacht which showed negligence as the yacht

A suffered damage when it was left on the seabed. They also claimed that the salving methods employed were unsuitable given the fragile nature of the yacht.

B **[73]** In this regard, I agree with the contention of the third party that the issue of delay was not pleaded in the particulars of negligence. Be that as it may, I did not think that the delay was unreasonable considering the size of the yacht, the depth of the sea, the yacht's fragility, the condition of the sea and the weather at the material times especially when it was approaching the C monsoon season.

[74] As to the condition of the vessel, the evidence of SP2 is pertinent. In his report, how the vessel came to be damaged was described as follows:

D > From our inspection after refloating, we have noted that vessel was in a very heavily damaged condition. The wooden structures had become loose and the hull had cracks all over probably due to the period underwater where it had rolled. The position where the vessel had sunk are artificially made with concrete blocks to attract fish and it is a fishing ground for local fishermen and the vessel could have E sustained structural damage when it rolled continuously and hitting the concrete blocks.
>
> The rolling and rocking of the vessel had partially damaged the vessel even before it was brought up and on subsequent refloating, huge waves have caused it to be damaged further.

F

[75] This was confirmed by SP2 in his evidence in court and by the third party himself. The third party testified that when the yacht was brought to shore, it was already rendered as constructive loss.

G

[76] It is noteworthy that after the salvage work was completed, the defendant proceeded to pay the third party for the work done. I can only think that the third party was paid because they were satisfied with the work done.

H

[77] Considering all these factors, I find that the defendant has failed to prove negligence on the part of the third party. Their claim against the third party must therefore fail.

I

[78] In the circumstances, there will be judgment for the plaintiff against the defendant for the sum of RM400,000 together with interest at 8%pa from the date of the writ of summons until payment. The plaintiff is also awarded costs, which after hearing the parties I assess at RM50,000.

[79] The defendant's claim against the third party is dismissed with costs. After hearing the parties, I assess the costs at RM15,000.

Plaintiff's claim allowed with costs and defendant's claim against the third party dismissed with costs.

Reported by Andrew Christopher Simon